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Report of the Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights, on his visit to Switzerland*

Note by the Secretariat

The Secretariat has the honour to transmit to the Human Rights Council the report of the Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights, Juan Pablo Bohoslavsky, on his mission to Switzerland from 25 September to 4 October 2017. The main objective of the mission was to study Swiss policies and efforts, at the national and international levels, aimed at curbing illicit financial flows, tax abuse and corruption and their impact on the enjoyment of human rights within and outside Switzerland. The visit also focused on the integration of human rights due diligence into the activities of public and private financial institutions operating in Switzerland.

* The present report was submitted after the deadline in order to reflect the most recent developments.

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Report of the Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights, on his visit to Switzerland**

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** Circulated in the language of submission and French only.

I. Introduction

1. The Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights, Juan Pablo Bohoslavsky, conducted an official visit to Switzerland from 25 September to 4 October 2017. The main objective of his visit was to study Swiss policies and efforts, at the national and international levels, aimed at curbing illicit financial flows, tax abuse and corruption and their impact on the enjoyment of human rights within and outside Switzerland. An additional aim of the mission was to examine the integration of human rights policies and human rights due diligence into the activities of public and private financial institutions.

2. In its resolution 34/3, the Human Rights Council requested the Independent Expert to pay particular attention to the impact of illicit financial flows on the enjoyment of human rights. The Independent Expert studied, among other aspects, measures deployed by Switzerland to combat tax evasion by transnational corporations and high-net-worth individuals and taxation policies for corporations and their impact on public revenues for the realization of economic, social and cultural rights in Switzerland and abroad. He also examined efforts to freeze, confiscate and return assets illicitly acquired by politically exposed persons and related challenges.

3. Switzerland is a prominent financial centre and a leading global location for cross-border management of private assets, with an estimated world market share of 25 per cent. The Swiss financial sector accounts for 9.1 per cent of gross domestic product (GDP) and assets held in Swiss banks by non-resident custody account holders amount to 2.92 trillion Swiss francs.[1] Integration of human rights due diligence into the financial sector and lending policies of Switzerland would therefore significantly reduce risks and prevent adverse human rights impacts.

4. The Independent Expert thanks the Government of Switzerland for its invitation and its full cooperation before, during and after the visit. He is grateful to all those who took the time to meet with him.

II. Human rights framework and policies

5. Switzerland is party to most human rights treaties, including the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. Article 54 (2) of the Swiss Constitution provides that the country shall assist in the alleviation of need and poverty in the world and promote respect for human rights and democracy, the peaceful coexistence of peoples and the conservation of natural resources.

6. The human rights strategy of Switzerland for 2016–2019 is aimed at promoting the universality, interdependence and indivisibility of human rights. The strategy underlines the importance of consistent domestic and foreign policy in the area of human rights to maintaining credibility. The Independent Expert welcomes the fact that the strategy emphasizes that Switzerland, as home to the headquarters of some of the world's largest multinational corporations, has a particular duty to encourage respect for human rights by private sector actors.[2] In December 2016, a national action plan on business and human rights was also adopted.

[1] Federal Department of Finance, State Secretariat for International Financial Matters, "Swiss financial centre: key figures October 2017", tables 1 and 8; and Swiss National Bank, "Banks in Switzerland 2016", vol. 101, pp. 22–23.

[2] Federal Department of Foreign Affairs, "Human Rights Strategy 2016–2019", in particular pp. 9 and 24. Available from www.eda.admin.ch/dam/eda/en/documents/publications/MenschenrechtehumanitaerePolitikundMigration/Strategie-Menschenrechte-160224_EN.pdf.

III. Illicit financial flows and human rights

7. While it is recognized that estimates of the amount of illicit financial flows leaving developing countries are, to some extent, imprecise, such flows are deemed to be substantial.[3] The amount of illicit financial flows leaving developing countries may be close to $1 trillion per year,[4] most of which can be linked to trade, tax evasion and tax avoidance. A significant percentage of such funds are deposited in financial centres, depriving developing countries of financial resources vital for the realization of economic, social and cultural rights.

8. The "Paradise Papers" of 2017, "Panama Papers" of 2016 and "Swiss Leaks" of 2015 indicated that politically exposed persons, high-net-worth individuals and transnational corporations are particularly likely to engage in cross-border tax evasion or avoidance, corruption or the misappropriation of public funds.[5] The likelihood of such deviance is higher among such actors owing to their positions of power and their ability to engage in cross-border financial transactions, or to the significant personal or corporate benefits that encourage such harmful behaviour.

9. Undoubtedly, States have a common interest in ensuring that human rights abuse, tax evasion, corruption and theft of public resources do not pay, that stolen assets are seized and returned to their legitimate owners and that those involved in such actions do not enjoy impunity.

10. Illicit financial flows are a global phenomenon and have adverse effects, not only on Switzerland, but on all countries, which are losing tax revenues and funds for domestic investment. However, those effects are particularly harsh for developing countries, which frequently lack adequate financial resources for establishing well-functioning institutions in the fields of education, food security, health, social security, water and sanitation, justice and law enforcement.[6]

11. Illicit financial flows nourish unsustainable debt and undermine efforts to enhance genuine social development. States and the international community have acknowledged the adverse effects of illicit financial flows in the 2030 Agenda for Sustainable Development. Target 16.4 of the Sustainable Development Goals explicitly notes the commitment of States to significantly reduce illicit financial and arms flows, strengthen the recovery and return of stolen assets and combat all forms of organized crime. In this context, the Independent Expert welcomes the approval in 2016, by the Swiss Federal Council, of a report on illicit financial flows from developing countries.[7]

12. The Independent Expert has always underlined that, in order to meet target 16.4, countries of origin and of destination must make joint efforts. In the case of Switzerland, this primarily requires taking appropriate steps to prevent illicit financial flows from entering its financial sector and to ensure that banks operating in Switzerland exercise due diligence with clients, in particular politically exposed persons and high-net-worth individuals. Such efforts also entail ensuring financial transparency and participation in multilateral exchanges of information in the field of taxation to reduce the likelihood that individuals can engage,

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[3] Regarding definition of illicit financial flows, see, for example, A/HRC/31/61 and A/HRC/28/60. A comprehensive definition was included in the report of the Swiss Federal Council on illicit financial flows from developing countries of 12 October 2016. Available (in German only) from www.admin.ch/gov/en/start/documentation/media-releases.msg-id-64112.html.

[4] Dev Kar and Joseph Spanjers, *Illicit Financial Flows from Developing Countries: 2004–2013* (Washington D.C., Global Financial Integrity, 2015). Available from www.gfintegrity.org/wp-content/uploads/2015/12/IFF-Update_2015-Final-1.pdf; see also Global Financial Integrity, *Illicit Financial Flows to and from Developing Countries: 2005–2014* (Washington D.C., Global Financial Integrity, 2017). Available from www.gfintegrity.org/wp-content/uploads/2017/05/GFI-IFF-Report-2017_final.pdf.

[5] For further information on the "Paradise Papers", "Panama Papers" and "Swiss Leaks", see www.icij.org/investigations/.

[6] Organization for Economic Cooperation and Development (OECD), *Illicit Financial Flows from Developing Countries: Measuring OECD Responses* (Paris, 2014).

[7] See www.admin.ch/gov/en/start/documentation/media-releases.msg-id-64112.html.

undetected, in tax evasion and tax avoidance. In addition, sanctions should be imposed in a timely, transparent and proportional manner against financial institutions that have failed to exercise due diligence, in order to guarantee that neither theft nor hiding of funds pay.

13. Countries of destination should, furthermore, ensure that illicit funds can be frozen, seized and returned in a timely and human rights-compliant manner to their legitimate owners in the countries of origin, in line with the United Nations Convention against Corruption and relevant international human rights law, which requires States, to the maximum of their available resources, to achieve the full realization of economic, social and cultural rights.[8]

IV. Efforts and challenges related to the curbing of illicit financial flows

14. The policies of Switzerland in relation to illicit financial flows have seen a positive change. Since 2008, many initiatives have been undertaken to strengthen the regulation of the Swiss banking sector, following revelations that banks domiciled in Switzerland facilitated tax evasion or lacked adequate due diligence procedures to prevent politically exposed persons from using Swiss jurisdiction to hide stolen assets. These policies are set out in a report of the Federal Council and include efforts to prevent and combat illicit financial flows by addressing the root causes of such flows in countries of origin,[9] including through international development cooperation.

A. Background

15. Before 2009, there was widespread cross-border tax evasion by foreign nationals from various jurisdictions, facilitated by banks operating in Switzerland. The data relating to tax evasion by tax payers of the United States of America are revealing in themselves. In 2009, UBS reached a $780 million settlement for facilitating tax evasion by taxpayers of the United States. By the end of January 2016, 80 additional banks operating in Switzerland had entered into non-prosecution agreements with the United States Department of Justice. The list of banks includes the Swiss branches of many well-known international commercial banks. The non-prosecution agreements include statements of facts providing details about how the respective banks or their employees had organized tax evasion schemes for their clients. Under the "Swiss Bank Programme", banks received a penalty based on the value of the assets held in undisclosed accounts. In total, the penalties imposed amounted to over $5.5 billion.[10]

16. There are no indications that such practices have been limited exclusively to clients in one jurisdiction. For example, account documents leaked from the Geneva-based private banking arm of HSBC, a foreign bank operating in Switzerland, indicated that HSBC had business relationships with people from more than 200 countries, among them several alleged tax dodgers, dictators and traffickers in blood diamonds and an alleged arms dealer who channelled mortar bombs to child soldiers in Africa.[11]

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[8] See International Covenant on Economic, Social and Cultural Rights, art. 2 (1); see also A/HRC/31/61 and A/HRC/28/60.

[9] Federal Council, "Unlautere und unrechtmässige Finanzflüsse aus Entwicklungsländern" in German only, 12 October 2016.

[10] United States Department of Justice, "Swiss Bank Programme", available from www.justice.gov/tax/swiss-bank-program; US Tax Program, "Swiss banks-penalty-statistics", available from www.ustaxprogram.com/penalty-statistics/; and, for details about non-prosecution agreements and penalties, United States Department of Justice, "Joint statement between the U.S. Department of Justice and the Swiss Federal Department of Finance", available from www.justice.gov/tax/file/631356/download.

[11] International Consortium of Investigative Journalists, "Banking giant HSBC sheltered murky cash linked to dictators and arms dealers", 8 February 2015. Available from www.icij.org/investigations/swiss-leaks/banking-giant-hsbc-sheltered-murky-cash-linked-dictators-and-arms-dealers/.

17. In April 2016, the Swiss Financial Market Supervisory Authority pointed out that, despite significant efforts to adopt legislation and improve procedures to detect suspicious transactions, the risk of continued abuse of the Swiss financial market for the purpose of money-laundering had not been eliminated.[12] Reports of the suspected involvement of financial institutions in facilitating tax evasion or money-laundering have continued to appear in the media.[13] The risk is also highlighted by the involvement of several Swiss banks in the Petrobras corruption scandal and in the suspicious cash flows linked to the 1Malaysia Development Berhad (1MDB) sovereign fund,[14] the subject of an investigation triggered by a report of a suspicious transaction by a Swiss financial institution to the Swiss Financial Intelligence Unit.

B. International commitments

18. Switzerland has committed itself to significantly reducing illicit financial and arms flows and to strengthening the recovery and return of stolen assets by 2030, in line with target 16.4 of the Sustainable Development Goals. Switzerland has also endorsed the Addis Ababa Action Agenda of the Third International Conference on Financing for Development, as a part of which States have committed themselves to combating tax evasion and corruption, enhancing tax transparency and making sure that all companies, including multinationals, pay taxes to the Governments of countries where economic activity occurs and value is created.

19. Switzerland has been party to the United Nations Convention against Corruption since 2009 and to the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions of the Organization for Economic Cooperation and Development (OECD) since 2000. Furthermore, the country is actively participating in the Action Plan on Base Erosion and Profit Shifting of OECD, participates in the automatic exchange of tax information (AEOI) between countries to fight tax evasion and tax avoidance at the international level and is also a member of the Financial Action Task Force (FATF).

20. Switzerland underwent several Financial Action Task Force peer reviews analysing the level of compliance of its anti-money-laundering and counter-terrorist financing system and policies. According to the Task Force's latest mutual evaluation report in 2016, the Swiss anti-money-laundering regime is technically robust and has achieved good results, but would benefit from some improvements in order to be fully effective. In the report, it was found that the Swiss financial system was exposed to a high risk of laundering of assets derived from offences that had mostly been committed abroad. In its report, the Task Force welcomed several legislative measures that strengthened the Swiss anti-money-laundering framework but recommended that sanctions for money-laundering be made sufficiently dissuasive. The Task Force concluded that the country was compliant with 6 recommendations, largely compliant with 25 and partly compliant with 9.[15] Switzerland is currently taking steps to address some of the deficiencies identified in the report.[16]

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[12] Mark Branson, Chief Executive Officer of the Swiss Financial Market Supervisory Authority, "Combating money-laundering is a duty of every banker", statement to the annual media conference 2016, 7 April 2016.

[13] "Credit Suisse faces tax probes in multiple countries", *Financial Times*, 31 March 2017; and "Verdacht auf Steuerhinterziehung: Steuerrazzia bei deutschen UBS Kunden" in German only, *Hanmdelsblatt*, 27 September 2017.

[14] Office of the Attorney General of Switzerland, "Annual report 2016", p. 19.

[15] Financial Action Task Force, *Anti-money-laundering and counter-terrorist financing measures — Switzerland, fourth round mutual evaluation report* (Paris, 2016), p. 11. Available from www.fatf-gafi.org/media/fatf/content/images/mer-switzerland-2016.pdf.

[16] Federal Council, "Federal Council defines thrust of follow-up work on FATF mutual evaluation report on Switzerland", 28 June 2017. Available from www.admin.ch/gov/en/start/documentation/media-releases/media-releases-federal-council.msg-id-67338.html.

C. Legal framework

21. Measures to avoid the entry of illicit funds into the country are central to an effective anti-money-laundering strategy. The Federal Act on Combating Money-Laundering and Terrorist Financing (Anti-Money-Laundering Act) provides the legal basis for efforts to combat the laundering of assets derived from corruption, aggravated tax offences or other felonies.

22. The Act sets out specific due diligence obligations for financial intermediaries, in particular with regard to dealing with politically exposed persons, in order to prevent "dirty money" deposits in Swiss accounts. Banks also have a duty to verify the identity of their customers and determine the beneficial owners of the assets held in their accounts.[17] They are required to re-evaluate the terms and, potentially, the continuity of their business relationship with politically exposed persons over time. Moreover, if a transaction raises any doubts, financial intermediaries are expected to take proactive measures and alert the Money-Laundering Reporting Office of Switzerland to investigate the transaction.

23. Banking secrecy (art. 47 of the Federal Act on Banks and Saving Banks) is not absolute. When suspicious transactions are reported in good faith,[18] the ban on revealing secret information shared in the context of a professional or business relationship does not apply. Financial intermediaries have a duty to report suspicious transactions to the authorities where the possibility that the assets are of criminal origin cannot be excluded. However, in the view of the Independent Expert, the distinction between mandatory and voluntary reporting by financial intermediaries leaves room for underreporting of questionable transactions.

24. Changes to Swiss criminal provisions may have improved the reporting of suspicious transactions by banks. On 1 January 2016, article 305 bis (1) of the Swiss Criminal Code entered into force. The article provides that any person who carries out an act that is aimed at frustrating the identification of the origin, the tracing or the forfeiture of assets which he or she knows or must assume originate from a felony or aggravated tax misdemeanour is liable to a custodial sentence not exceeding three years or to a monetary penalty. However, laundering assets derived from an aggravated tax misdemeanour is only a criminal offence in Switzerland if the tax evaded in any tax period exceeds SwF 300,000. In other words, bank employees may only incur criminal liability for money-laundering if they should have good reason to suspect that they are assisting a wealthy client in committing a serious tax offence.[19] Such high thresholds do not exist for assisting in the evasion of federal, cantonal or communal taxes, which can be punished in Switzerland by a fine of up to SwF 10,000, and, in more serious cases, by a fine of up to SwF 50,000.[20]

25. While such provisions may encourage enhanced due diligence regarding high-net-worth clients, they may be insufficient to prevent money-laundering or the facilitation of tax evasion within the Swiss banking sector. First, the SwF 300,000 threshold is rather high. Second, Swiss prosecution authorities often face difficulties when assessing whether the evaded tax exceeds the specified amount, as this requires knowledge of the tax law of various foreign jurisdictions. Third, Swiss law only penalizes tax fraud as defined in articles 59 (1) and 186 respectively of the Federal Act on the Harmonization of Direct Taxation at the Cantonal and Communal Levels of 14 December 1990 and the Federal Act on Direct Federal Taxation. The term "tax fraud" does not cover all forms of tax evasion, as it requires the falsification of documents. Lastly, the fines for assisting tax evasion are low and may not be sufficient to discourage such behaviour.

26. Although it may be too early to assess the impact of article 305 bis (1), prosecutors indicated to the Independent Expert that they were not aware of any criminal investigation launched under that provision. In addition, the Swiss Financial Intelligence Unit has not

[17] Federal Act on Combating Money-Laundering and Terrorist Financing, art. 3.

[18] Ibid., art. 11.

[19] Criminal Code.

[20] Federal Act on the Harmonization of Direct Federal Taxation at the Cantonal and Communal Levels of 14 December 1990, art. 56 (3) and Federal Act on Direct Federal Taxation of 14 December 1990, art. 177.

received many reports of suspicious transactions related to tax fraud. This can be partly explained by the fact that Swiss banks have pushed their clients to regularize their deposits or have terminated business relationships with suspicious clients.

D. Automatic exchange of information for tax purposes

27. On 1 January 2017, the Convention on Mutual Administrative Assistance in Tax Matters, which allows for automatic, spontaneous exchange of tax information as well as exchange of information on request, entered into effect in Switzerland. On the same date, the Multilateral Competent Authority Agreement on Automatic Exchange of Financial Account Information entered into force in Switzerland.

28. The introduction of the automatic exchange of information for tax purposes is an important step in the fight against tax evasion. It will hamper foreign nationals from participating jurisdictions in their efforts to hide undeclared assets in Swiss bank accounts. Swiss residents who have moved assets abroad in order to evade Swiss taxes are similarly affected, as the Swiss tax administration will receive bank account information related to them for assets held abroad. However, jurisdictions participating in the system must have well-functioning and independent tax enforcement authorities that can use the data exchanged and enforce compliance with tax obligations.

29. The Independent Expert commends Switzerland on having started, as of 1 January 2017, along with 38 other jurisdictions, the automatic exchange of information for tax purposes. The automatic exchange of information standard requires Switzerland to provide financial account information related to accounts held with Swiss financial institutions by tax residents in foreign jurisdictions to the States concerned once a year. In return, Switzerland receives information from participating jurisdictions about accounts held abroad by Swiss residents. On 1 January 2018, Switzerland introduced the automatic exchange of information with 40 further jurisdictions, with a first exchange of information planned for autumn 2019.[21]

30. The automatic exchange of information system may not be an effective tool for curbing tax evasion in developing countries that do not meet the technical requirements for participation therein. Like other developed countries, Switzerland should consider expanding the number of developing countries participating in the new global standard by providing technical assistance and allowing low-income countries to gradually implement the provision of taxation information. Switzerland can build upon its expertise acquired in development cooperation projects aimed at strengthening national tax administrations and has, since 2015, been providing technical assistance in the context of the Global Forum on Transparency and Exchange of Information for Tax Purposes, and participates in the African Tax Administration Forum, which supports capacity-building in African States. The participation of developed and developing countries is crucial to efforts to enhance transparency and international tax cooperation at the global level.

31. The stringent requirements set by OECD in terms of confidentiality and data management remain difficult for some countries to meet, although such standards are important in protecting the right to privacy. Information provided to foreign tax authorities could potentially be misused for purposes other than the investigation of tax offences. In some countries, human rights defenders and opponents of Governments have been prosecuted for alleged tax offences in a rather suspicious or selective way, suggesting that prosecution is motivated less by a desire to ensure tax justice than by the wish to obstruct their legitimate activities and reduce civic space.

32. OECD requires full reciprocity from its counterparts when entering into data-exchange agreements, which implies a certain level of administrative and technical capacity and infrastructure. A number of developing countries have difficulties meeting such requirements.

[21] https://www.efd.admin.ch/efd/en/home/themen/wirtschaft--wachrung--finanzplatz/finanzmarktpolitik/automatic-exchange-of-information--aeoi-.html.

33. Switzerland is also active in the field of exchange of tax information on request with more than 100 jurisdictions, including several developing countries, based on double-taxation agreements, tax-information-exchange agreements and the Federal Act on International Administrative Assistance in Tax Matters.

E. Reducing corporate tax abuse and harmful tax competition

34. Switzerland has also begun implementing various measures to avoid profit shifting by multinational corporations, such as action 13 of the Base Erosion and Profit Shifting Project of the OECD. The aim is to ensure that corporate tax revenues are paid where real economic activities are taking place, labour is performed and profits are made. The Independent Expert encourages Switzerland to consider requiring multinational enterprises to publicly report, on a country-by-country basis, the taxes they have paid, as, in his view, non-public reporting is insufficient to ensure tax transparency by transnational corporations.

35. In 2016, the Government presented the Swiss electorate with a comprehensive corporate tax reform package, which included measures to bring Swiss corporate tax regimes into line with OECD standards in order to combat base erosion and profit shifting by multinational companies. The new law would have outlawed certain tax reduction regimes that are no longer accepted internationally, replacing them with patent box regimes and other avenues for tax reduction and profit shifting from abroad.

36. In February 2017, the proposal put forward by the Government and the Parliament of Switzerland did not garner majority support in a public referendum. In September 2017, the Federal Council published a revised "tax proposal 17" for public consultation, with the aim of ensuring the compliance of Swiss corporate tax regimes with OECD standards.[22] The Independent Expert is concerned about the potential human rights impact of the revised tax reform in foreign countries. Essentially, "tax proposal 17" aims to keep taxation for multinational corporations and other businesses at low levels to attract businesses to and persuade them to establish their headquarters in Switzerland. Attracting businesses may well bring benefits for the country in the form of tax receipts and employment opportunities. However, excessive tax competition between countries is harmful, as it has resulted in the dramatic reduction of corporate tax payments by large corporations worldwide and contributed to the reduction of public revenues for investment and the rise in unsustainable public debt in many countries, especially in the developing world.

37. Importantly, the reduction of corporate tax rates for businesses or tax exemptions for transnational corporations should not undermine the ability of federal, cantonal or local government institutions in Switzerland to meet their human rights obligations, in particular in the fields of education, social security, health and culture. Nor should corporate tax reforms result in a shifting of tax burdens from businesses to low- or middle-income households.

38. Low tax regimes provide incentives for profit shifting and result in reduced tax revenues in those countries where most of the real business takes place, thus shrinking the fiscal space of States to fulfil their human rights obligations. The Independent Expert calls upon the Swiss government, at the federal, cantonal and local levels, to carry out a social and human rights impact assessment of the tax reform package, which should include an assessment of the impact of the package on tax revenues available for the realization of economic and social rights within Switzerland and abroad, in particular in developing countries.[23]

39. In this context, he would like to recall that article 141 (a) and (g) of the Federal Act on the Federal Assembly requires the Government to submit assessments on the impacts of draft laws on the economy, society, environment and future generations and assess their compliance with fundamental rights and binding international law. A recent Swiss Federal Audit Office report indicated, however, that only one third of all Federal Council dispatches

[22] Federal Council, "Federal Council initiates consultation on tax proposal 17", 6 September 2017. Available from www.admin.ch/gov/en/start/documentation/media-releases.msg-id-68007.html.

[23] For the principles that should inform such assessments, see A/HRC/37/54.

met the minimum requirements regarding the assessment of impact on society and the environment.[24]

40. Unfortunately, the information available on "tax proposal 17" does not include a detailed assessment of the nature of the reform package's impact on the enjoyment of economic, social and cultural rights in Switzerland and abroad.

F. Institutional framework for tracing stolen assets and curbing money-laundering

41. It is of paramount importance that the State play a balanced and nuanced role in ensuring accountability, transparency and fairness in the financial sector when dealing with human rights abuses and illicit financial flows. The supervision of Swiss banks through self-regulatory norms set by the Swiss Bankers Association and regulation by the Swiss Financial Market Supervisory Authority are therefore crucial.

42. It is the view of the Independent Expert that the staffing, resources and powers of the Swiss Financial Market Supervisory Authority need to be proportional to the size of the Swiss financial market and the volume of assets managed by its financial institutions. The Authority should have sufficient capacity to supervise all banks and financial intermediaries adequately, irrespective of their size.

43. Investigations of recent cases show that, although the majority of banks fulfilled their duties under the Federal Act on Combating Money-Laundering and Terrorist Financing, a minority had failed to do so. In the Petrobras case, for instance, the Swiss Financial Market Supervisory Authority revealed that 75 per cent of the approximately 20 Swiss banks involved applied money-laundering rules in conformity with the Swiss legal regime. However, the Authority noted that, with regard to the remaining 25 per cent of banks, there were concrete indications that the anti-money-laundering measures they had in place were inadequate.[25] The Authority has dissolved one bank, withdrawn the fiduciary licences of a number of companies and ordered the disgorgement of illegally generated profits in the context of enforcement.

44. The Independent Expert welcomes the Swiss Financial Market Supervisory Authority's publication, in 2011, of an investigation into the due diligence obligations of Swiss banks handling assets of politically exposed persons, indicating that it had initiated administrative proceedings against 4 out of the 20 banks audited. The names of those 4 banks, with regard to which serious gaps were found, were not made public. Hence, the general public has been left to wonder which banks had serious flaws in their due diligence procedures or carried out clarifications solely with a view to safeguarding the bank's own reputation, with little consideration being given to the risk of money-laundering.[26] Neither is there any information available as to whether sanctions were imposed and, if so, on which financial institutions.

45. The Independent Expert also commends the Swiss Financial Market Supervisory Authority for publishing, since 2014, annual enforcement reports[27] and for recently issuing press statements indicating measures taken against particular financial institutions in the most egregious cases of non-compliance. However, the Independent Expert regrets that the enforcement reports do not name the financial institutions subjected to sanctions. In his

[24] Swiss Federal Audit Office, *Prognosen in den Botschaften des Bundesrates: Evaluation der prospektiven Folgenabschätzungen von Gesetzentwürfen* in German only (Bern, 2016). Available from https://biblio.parlament.ch/e-docs/389085.pdf.

[25] Mark Branson, Chief Executive Officer of the Swiss Financial Market Supervisory Authority, "Combating money-laundering is a duty of every banker", statement to the annual media conference 2016, 7 April 2016.

[26] See Swiss Financial Market Supervisory Authority, "Due diligence obligations of Swiss banks when handling assets of 'politically exposed persons'. An investigation by FINMA", 28 October 2011, p. 9.

[27] Available from www.finma.ch/en/documentation/finma-publications/reports/enforcement-reports/.

opinion, the purpose of enforcement is to avoid repetition of infringements and ensure individual corporate accountability for non-compliance with banking regulations.

46. Financial intermediaries are required to submit information about suspicious transactions to the Money-Laundering Reporting Office of Switzerland. After gathering information on the origin of the assets or on suspect persons, the Office may forward it to prosecutors for potential action. In 2016, the Office received 2,909 suspicious transaction reports related to financial transactions of a total value of 5.32 billion SwF. Currently, most suspicious transaction reports are received from banks, with only a very small number of fiduciaries reporting suspicious transaction to the Office. After review, in 2016, 71.3 per cent of all cases were forwarded to the judicial authorities.[28]

G. Prosecution

47. The Office of the Attorney General of Switzerland and cantonal prosecutors have specialized units for financial crimes and crimes related to money-laundering. Complex, large-scale investigations have been conducted at both the federal and cantonal levels, including cases involving predicate offences committed outside Switzerland.

48. In 2016, prosecution authorities and courts received 766 suspicious transaction reports from the Money-Laundering Reporting Office of Switzerland. In about half of all cases, the proceedings were dismissed, 108 cases resulted in the issuing of a judgment by a court and only 3 per cent resulted in the acquittal of the defendant.[29] In addition, criminal investigations into money-laundering cases can be opened by the federal and cantonal prosecution authorities in response to requests for mutual legal assistance, police reports, complaints filed by members of the public and reports from other federal and cantonal authorities. In total, every year between 200 and 300 cases result in convictions.[30]

49. The Swiss authorities have successfully identified and dismantled several sophisticated money-laundering networks. In the 1MDB and Petrobras cases, the Office of the Attorney General of Switzerland initiated dozens of proceedings in which the alleged offence was large-scale corruption resulting in losses amounting to the equivalent of hundreds of millions, if not billions of Swiss francs for Malaysia and Brazil.[31] In the 1MDB case, assets intended for the economic and social development of Malaysia estimated to be as high as several billion dollars had been transferred to Swiss accounts held by former officials of Malaysia and the United Arab Emirates.[32]

50. In some instances, national efforts to ensure accountability for economic crimes committed in multiple jurisdictions can be undermined if a mechanism for genuine international cooperation is not in place. The Swiss authorities have, in the past, faced difficulties in ensuring accountability where efforts to bring a successful prosecution domestically depended on the political will of foreign authorities to prosecute the underlying criminal acts committed in their jurisdictions.

H. Freezing, confiscation and repatriation of stolen assets

51. Switzerland has demonstrated an increasing willingness to freeze and confiscate stolen assets. The first case involved the freezing of several million Swiss francs related to former Philippine ruler Ferdinand Marcos when he was forced into exile in 1986. Other prominent cases include Sani Abacha, of Nigeria, Mobutu Sese Seko, of the Democratic Republic of the Congo, Vladimiro Montesinos, of Peru, and Jean-Claude Duvalier, of Haiti. In January 2011, Switzerland swiftly froze accounts belonging to former presidents of Egypt

[28] Federal Office of Police, *MROS 19th Annual Report: 2016* (Bern, 2017), sect. 2 (2) (4).

[29] Ibid., p. 14.

[30] Financial Action Task Force, *Anti-money-laundering and counter-terrorist financing measures – Switzerland, fourth round mutual evaluation report* (Paris, 2016), table 10.

[31] Ibid., para. 183.

[32] Federal Office of Justice, "Annual activity report 2016: mutual legal assistance", p. 14.

and Tunisia and their entourages and, in February 2014, assets belonging to a former president of Ukraine. Switzerland has also frozen the assets of politically exposed persons from Libya and the Syrian Arab Republic in the context of international sanctions. In total, over the past 30 years, Switzerland has returned about $2 billion of illicit assets to their countries of origin.[33]

52. The freezing of large assets held by corrupt and human rights abusing leaders has, however, raised questions about why Swiss financial institutions managed such assets for many years without alerting the authorities as to their suspicious nature or carrying out due investigations. Allegations that those leaders were involved in corruption or responsible for human rights violations were circulating widely when they were still in power.

53. In 2011, Switzerland adopted a law aimed at facilitating the freezing and return of stolen assets of politically exposed persons and their entourages. In 2014, the country further refined its policies by adopting a comprehensive strategy on freezing, confiscating and returning the illicitly acquired assets of politically exposed persons, which included preventive and repressive measures.[34]

54. The Swiss legal framework was further strengthened by the revision, in December 2015, of the Foreign Illicit Assets Act. The Act provides for the freezing of assets when the country of origin is unable to satisfy the requirements for mutual legal assistance owing to the total or substantial collapse, or the impairment, of its judicial system. In such circumstances, the Act provides for the seizure of assets on the reasonable presumption that they must have been acquired by illicit means, thus reversing the burden of proof. The Act specifies that the aim of the restitution of assets is to strengthen the rule of law and to improve the living conditions of the inhabitants of the country of origin.

55. However, according to article 3 (2) (a) of the Foreign Illicit Assets Act, assets can only be frozen if the Government or certain members of the Government of the country of origin have lost power, or a change in power appears inevitable. In other words, under this Act, Switzerland cannot freeze the assets of politically exposed persons while they are still firmly in power, unless such an action is carried out on the basis of an international sanctions regime or in the, highly unlikely, event that a request for mutual legal assistance in criminal matters is received from the country of origin while the leader in question is still in power.

56. Adequate strategies need to be developed at the international and national levels to reduce the risk of financial support and services strengthening leaders involved in criminal conduct and resulting in the continued perpetration of serious human rights violations. Regrettably, compared to measures in place to prevent the financing of terrorism, international standards to prevent the provision of financial services to States and individuals responsible for serious violations of human rights remain underdeveloped.[35]

57. The Swiss authorities have encountered challenges concerning judicial confiscation. For instance, under Swiss criminal law, prosecutors are required to provide evidence that any assets frozen relate to a crime. Thus, proving that there is a link between a given crime and the assets frozen is usually key to ensuring the seizure, confiscation and return of stolen assets. Assets can only be seized from a politically exposed person or his or her entourage based on presumption of their illicit origin in situations covered by the Foreign Illicit Assets Act. Certain narrowly defined conditions must be fulfilled: the country of origin must be unable to engage in mutual legal assistance owing to the total or substantial collapse, or impairment, of its judicial system; the wealth of the asset holder must have increased inordinately,

[33] Federal Department of Foreign Affairs, "No dirty money: the Swiss experience in returning illicit assets". Available from www.eda.admin.ch/dam/eda/en/documents/aussenpolitik/voelkerrecht/edas-broschuere-no-dirty-money_EN.pdf.

[34] Federal Department of Foreign Affairs, "Stratégie de la Suisse concernant le blocage, la confiscation et la restitution des avoirs de potentats («Asset Recovery»)" in French only. Available from www.eda.admin.ch/content/dam/eda/fr/documents/aussenpolitik/finanzplatz-wirtschaft/Strategie-Schweiz-Sperrung-Einziehung-Rueckfuehrung-Potentatengelder_FR.pdf.

[35] For a more detailed analysis, see A/HRC/26/59.

facilitated by the exercise of a public function; and there must have been notoriously high levels of corruption during his or her term of office.[36]

58. In all other situations, when asset recovery proceeds on the basis of mutual legal assistance, the Swiss authorities seize assets pursuant to a mutual legal assistance request if the condition of dual criminality is met, and provide the requesting State with evidence enabling the courts of the requesting State to order the confiscation of the assets frozen in Switzerland. Based on the confiscation decision in the requesting State, the frozen assets are then returned to the requesting State. However, the Money-Laundering Reporting Office of Switzerland reports that the chances of obtaining information from abroad vary depending on the foreign country in question.[37] In addition, due process standards in Switzerland allow holders of accounts containing stolen assets to challenge freezing and expropriation decisions. While due process is very important from a human rights point of view, adequate measures should be taken to ensure that judicial guarantees do not result in stolen assets only being returned after extremely lengthy legal procedures before the Swiss courts.

59. Efforts to return stolen assets to Egypt illustrate the difficulties in this regard. On the same day that former President Hosni Mubarak was ousted, the Swiss Federal Council issued an order freezing all his assets and those of his entourage. Subsequently, close to $700 million of assets were frozen. Criminal prosecutions were launched in Egypt and Switzerland. However, in December 2016, after several years of investigations, the Attorney General of Switzerland announced that he would drop criminal proceedings against several persons and order the unblocking of 180 million SwF. Following an analysis of Egyptian court decisions by the Office of the Attorney General of Switzerland, it was concluded that it was unlikely that a link could be established between the funds in question and a crime committed in Egypt.[38]

60. In December 2017, the Federal Council decided to unfreeze the remaining assets from Egypt with immediate effect, given that the Egyptian courts had dropped all relevant criminal proceedings with possible links to Switzerland.[39] The assets have only remained blocked because criminal procedures in Switzerland are still ongoing. The result is rather unfortunate. Despite more than five years of investigations and regular exchanges between the Swiss and Egyptian authorities, it appears unlikely that the assets frozen in Switzerland will be returned to Egypt for the benefit of the local population.

61. The innovative Foreign Illicit Assets Act was of no assistance in this case. The Swiss authorities maintained that Egypt was not a failed State without a functioning judicial system. Therefore, asset recovery efforts took place exclusively on the basis of mutual legal assistance requests. However, the Swiss authorities could not continue to block assets indefinitely, without sufficient proof that they had been acquired by irregular means.

62. The Independent Expert therefore recommends strengthening the Swiss legal framework for asset recovery by reversing the burden of proof to the extent permitted by international human rights standards. The Swiss authorities should be empowered to seize assets from politically exposed persons where there are well-founded reasons to believe that those assets derive from corruption or other criminal conduct. In such cases, the onus should be on the corresponding account holder to demonstrate that all assets held by him or her have been acquired by legitimate means.

63. The Swiss authorities have also occasionally faced difficulties in guaranteeing that assets returned are used for the benefit of the population, as required by the Foreign Illicit

[36] Foreign Illicit Assets Act, arts. 4 and 15.

[37] See Federal Office of Police, *MROS 19th Annual Report: 2016* (Bern, Federal Office of Police, 2017), sect. 2 (2) (6).

[38] Federal Council, "Arab Spring: Attorney General meets Egyptian authorities in Cairo", 17 December 2016. Available from www.admin.ch/gov/en/start/documentation/media-releases.msg-id-64958.html.

[39] Swissinfo, "Freeze of foreign assets in Swiss banks extended", 20 December 2017. Available from www.swissinfo.ch/eng/tunisia--egypt--ukraine_freeze-of-foreign-assets-in-swiss-banks-extended/43770116.

Assets Act. The authorities have learned from past cases and have taken measures to prevent returned funds from being misappropriated again.[40]

64. The Independent Expert recalls that participation and transparency are core human rights principles that should guide the restitution of stolen assets, as stated in the principles for disposition and transfer of confiscated stolen assets in corruption cases welcomed at the Global Forum on Asset Recovery held in Washington D.C. from 4 to 6 December 2017.[41] It is important that stolen funds are returned to their legitimate owners in a timely manner, that the owners of those funds have a say in their final use and that there is full transparency and accountability regarding the use of the funds after their return.

65. Many countries from which assets have been stolen are going through transitional periods, dealing with past atrocities. When the regulatory authorities or criminal courts find that financial intermediaries have failed to exercise the required due diligence when receiving or managing returned funds, human rights victims of the country concerned need and deserve an explicit public apology from the respective financial institutions and compensation. Such an approach constitutes an important step in rebuilding trust in the context of transitional justice and may often be as important as the actual return of the stolen assets.

V. Integration of human rights due diligence into private and public financial institutions

A. Regulatory framework

66. While several banks have adopted human rights policies at the corporate level, there are no Government regulations, nor any directives or recommendations issued by self-governing bodies, on how financial institutions in Switzerland should apply human rights due diligence in their operations. There are very few pieces of federal legislation that prohibit financial institutions from making investments on the grounds of human rights issues.

67. The most prominent example of such legislation is the Federal Act on War Material, under which the financing of the development, manufacture or acquisition of nuclear, biological or chemical weapons, anti-personnel mines and cluster munitions has been prohibited since 2013.

68. The Independent Expert welcomes the revision of the Federal Act on War Material, which prohibits the financing of weapons that continue to violate the right to life, personal integrity and health of civilians long after they have been deployed in armed conflicts. He is, however, concerned that the Act may be insufficient to prevent the indirect financing of such weapons, as it does not prohibit investment in companies that also produce other goods. Furthermore, to his knowledge, no individual has, to date, been prosecuted for financing prohibited war materials. Furthermore, the Act does not specify how the competent federal authorities should monitor financial institutions' compliance with the prohibition.

69. With regard to the regulation of the conduct of businesses, the Federal Act on War Material is an exception. Usually, the Swiss authorities encourage the adoption and promotion of voluntary human rights standards within the private sector. There are currently no regulations to ensure human rights due diligence on the part of financial institutions and their corporate liability regarding potential human rights violations.

[40] See Federal Council, "Memorandum of Understanding among the Government of the Federal Republic of Nigeria, the Swiss Federal Council and the International Development Association on the return, monitoring and management of illegally acquired assets confiscated by Switzerland to be restituted to the Federal Republic of Nigeria", 4 December 2017. Available from www.newsd.admin.ch/newsd/message/attachments/50734.pdf.

[41] Global Forum on Asset Recovery, communiqué. Available from star.worldbank.org/star/sites/star/files/20171206_gfar_communique.pdf.

B. National action plan on business and human rights

70. In December 2016, the Government adopted the national action plan for the implementation of the Guiding Principles on Business and Human Rights in Switzerland, following consultations with the private sector and non-governmental organizations (NGOs). The plan covers all business enterprises based, headquartered or operating in Switzerland, including financial institutions, State-owned enterprises and public-private institutions. In addition, in 2015, the Federal Council adopted an action plan on corporate social and environmental responsibility, covering some human rights issues.[42]

71. The national action plan endorses the concept of a smart mix of mandatory and voluntary commitments. However, only a few of its action points refer to regulatory measures for improving business respect for human rights. According to the Committee on Economic, Social and Cultural Rights, States have a positive duty to adopt a legal framework requiring business entities to exercise human rights due diligence.[43] The Committee has stressed that States are required to remove substantive, procedural and practical barriers to remedies, including by establishing parent company or group liability regimes.[44] An alliance of 85 civil society organizations has, therefore, launched a responsible business initiative aimed at embedding human rights and environmental due diligence obligations in the Swiss Constitution and in federal law, including regulations relating to the civil liability of business enterprises, to ensure better protection for victims of corporate human rights abuses.[45]

72. Apart from referring to the role played by the Thun Group of Banks, the national action plan does not include any specific action points in relation to the Swiss financial sector.

C. National contact point

73. In 2000, Switzerland established a national contact point to promote the implementation of the OECD Guidelines for Multinational Enterprises and to receive complaints from individuals and interest groups about violations of the OECD Guidelines.[46] Since 2011, the OECD Guidelines have included a human rights chapter consistent with the Guiding Principles on Business and Human Rights. Hence, concerns about adverse human rights impacts and human rights violations, including lack of due diligence by businesses and financial institutions headquartered in Switzerland can also be brought to the attention of the national contact point. The national contact point can offer mediation between the complainant and the concerned business enterprise.

74. Since 2000, 18 complaints have been submitted to the Swiss national contact point,[47] including, for the first time, in April 2017, a complaint against a Swiss corporate bank, Credit Suisse, concerning its business relationships with companies of the United States involved in the construction of the North Dakota access pipeline. In the complaint, it was alleged that the construction of the pipeline would result in violations of the human rights of affected indigenous communities.[48]

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[42] Federal Council, "Position et plan d'action du Conseil fédéral concernant la responsabilité des entreprises à l'égard de la société et de l'environnement" in French, 21 June 2017. Available from www.seco.admin.ch/seco/en/home/Aussenwirtschaftspolitik_Wirtschaftliche_Zusammenarbeit/Wirtschaftsbeziehungen/Gesellschaftliche_Verantwortung_der_Unternehmen/CSR.html.

[43] See general comment No. 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities, para. 16.

[44] Ibid., para. 44.

[45] Swiss Coalition for Corporate Justice, "The responsible business initiative: protecting human rights and the environment". Available from http://konzern-initiative.ch/.

[46] State Secretariat for Economic Affairs, "National contact point of Switzerland". Available from www.seco.admin.ch/seco/en/home/Aussenwirtschaftspolitik_Wirtschaftliche_Zusammenarbeit/Wirtschaftsbeziehungen/NKP.html.

[47] OECD, "Database of specific instances". Available from http://mneguidelines.oecd.org/database.

[48] Society for Threatened Peoples, "Society for Threatened Peoples files OECD complaint against Credit Suisse at the OECD national contact point (NCP) Switzerland", 28 April 2017. Available from www.gfbv.ch/wp-content/uploads/summary_2017_ncp_complaint-stp.pdf.

75. In an initial assessment, the Swiss national contact point found that the issues raised in the complaint merited further consideration and offered to mediate between the parties.[49] The Independent Expert welcomes this decision by the national contact point and hopes the mediation process will assist in clarifying the matter and help to address some of the concerns expressed. The case under consideration is an example of how national contact points can contribute to promoting human rights due diligence in the financial sector. However, he highlights the limitations of the powers of the national contact point, which cannot indicate in its final statements whether a violation of the OECD Guidelines took place, is not in the position to impose or enforce remedial measures and cannot force business enterprises to take part in the mediation process.[50]

D. Human rights policies of commercial and private banks

76. The two largest commercial banks in Switzerland, UBS and Credit Suisse, have adopted their own human rights policies, with the former also incorporating its human rights due diligence policy into its environmental and social risk policy framework.[51] UBS excludes doing business with or investing in companies whose activities pose a threat to world heritage sites, wetlands, species or high-conservation-value forests, involve illegal logging or the use of child or forced labour according to the International Labour Organization's Forced Labour Convention, 1930 (No. 29), Minimum Age Convention, 1973 (No. 138) and Worst Forms of Child Labour Convention, 1999 (No. 182), or disrespect indigenous peoples' rights.

77. In a comparative study of 45 international commercial banks, UBS and Credit Suisse were awarded 6.5 out of a possible 12 points in relation to their human rights policies, ahead of most of the banks evaluated. However, UBS and Credit Suisse were very poorly rated with regard to ensuring that concerned individuals have access to effective remedies, as specified in the Guiding Principles on Business and Human Rights, garnering, respectively, 0 and 0.5 out of a possible 3 points.[52] This appears to be a sector-wide issue. Most of the financial institutions reviewed were rated poorly for access to remedies. Tax evasion and tax avoidance by individuals and corporations have, to date, been regarded more as issues related to compliance with national banking regulations and anti-money-laundering law, than as human rights issues.

78. The Independent Expert welcomes the leading role of UBS and Credit Suisse in setting up the Thun Group of Banks to engage with peer international banks in a discussion and exchange of information on human rights due diligence. However, he, like the Working Group on the issue of human rights and transnational corporations and other business enterprises, is concerned that one of the Thun Group's recent discussion papers would unduly limit banks' responsibilities for preventing and mitigating human rights impacts that are directly linked in the context of their client relationship.[53] He therefore welcomes the fact that the Thun Group recently invited human rights experts and NGOs to its annual meeting and hopes that the concerns expressed by those experts will be taken into account. He further recommends that the Thun Group study the issue of lending in contexts marked by gross

[49] See national contact point of Switzerland, "Initial assessment: specific instance regarding Credit Suisse submitted by the Society for Threatened Peoples Switzerland", 19 October 2017.

[50] Laurent Matile, "Economic associations are opposed to the introduction of civil liability for business-related human rights violations and environmental degradation, as proposed under the Responsible Business Initiative; they point to national contact point", 27 October 2017. Available from www.alliancesud.ch/en/politics/business-and-human-rights/national-contact-point-limits-dialogue.

[51] UBS, "Our environmental and social risk management framework", 23 October 2014. Available from www.ubs.com/content/dam/ubs/global/about_ubs/corporate_responsibility/UBS-ESR-framework.pdf.

[52] Banktrack, "Banking with principles? Benchmarking banks against the UN Guiding Principles on Business and Human Rights", second edition, June 2016. Available from www.banktrack.org/download/banking_with_principles/bwp_ii_final.pdf.

[53] See www.ohchr.org/Documents/Issues/TransCorporations/WG_BHR_letter_Thun_Group.pdf and www.ohchr.org/Documents/Issues/Business/InterpretationGuidingPrinciples.pdf.

violations of human rights, with the aim of developing adequate strategies to reduce the risk of financial complicity with the regimes concerned.[54]

79. Furthermore, he encourages the Government, the Swiss banking sector, the Association of Swiss Private Banks and professional and civil society associations to consider developing a banking sector agreement on responsible business conduct in Switzerland. The Dutch Banking Sector Agreement on international responsible business conduct regarding human rights may be a source of inspiration in this regard.[55] In his view, there is a need to develop a common understanding and enhance consistency regarding what it means to include human rights due diligence in the financial sector.

E. Public financial institutions

80. Owing to their links with the State, public financial institutions, State-owned companies and pension funds for public sector workers in particular are expected to exercise human rights due diligence.

81. According to its policy statement, Swiss Export Risk Insurance gives high priority to human rights, social issues and the environment when assessing insurance applications. Swiss Export Risk Insurance has adopted guidelines for reviewing environmental, social and human rights issues that are based on the OECD Common Approaches on Environment and Officially Supported Export Credits. According to the Federal Act on Swiss Export Risk Insurance, insurance cover can be excluded, suspended or reduced if it has been concluded on the basis of false information provided by the applicant. This may include the withholding of information in relation to social, environmental or human rights risks related to the business for which risk insurance had been requested.

82. The Independent Expert would like to encourage Swiss Export Risk Insurance to provide the public with information about its own grievance mechanism that would allow affected individuals or communities covered by its risk insurance to bring concerns directly to its attention, in particular where local grievance procedures undertaken by its insured clients have failed. A first step would be to indicate a complaint-submission procedure or to establish an independent complaints mechanism. In order to allow external stakeholders to identify whether a particular investment is covered by Swiss Export Risk Insurance's export insurance, it would be important to provide information about the export businesses covered on a country-by-country basis.

83. The Independent Expert welcomes the fact that an increasing number of pension funds in Switzerland have been adopting investment policies that include human rights criteria, such as the public pension funds of Geneva and Vaud Cantons. In December 2015, seven public pension funds managing investment assets totalling over SwF 150 billion founded the Swiss Association for Responsible Investments. They now plan to jointly exercise their environmental, social and economic responsibilities in a holistic way. The Independent Expert would like to encourage insurance companies and public and private pension funds in Switzerland to adopt similar measures to avoid investing in companies that fail to respect human rights and international labour standards, or that are involved in tax evasion, corruption or the illicit trade in arms.

84. The Independent Expert welcomes the Swiss National Bank's revision of its investment policy guidelines in 2015, according to which the Bank avoids investing in shares in companies that produce internationally banned weapons, seriously violate fundamental human rights or systematically cause severe environmental damage.[56] When seeking to

[54] See A/HRC/28/59 and www.ohchr.org/Documents/Issues/Development/IEDebt/LetterThunGroup.pdf.

[55] Dutch Banking Sector Agreement on international responsible business conduct regarding human rights. Available from www.ser.nl/en/~/media/files/internet/publicaties/overige/2010_2019/2016/dutch-banking-sector-agreement.ashx.

[56] Swiss National Bank, "Investment policy guidelines of the Swiss National Bank (SNB)", sect. 3 (2). Available from www.snb.ch/en/mmr/reference/snb_legal_richtlinien/source/snb_legal_richtlinien.en.pdf.

identify offending companies, the Bank relies on the recommendations of external companies specializing in that task.[57] The Bank has not disclosed any further details of how it ensures that it avoids investing in companies responsible for human rights abuses, nor has it publicly reported on which equity investments have been excluded from its portfolio due to human rights concerns since 2015.

F. Incorporating human rights due diligence into investment policies

85. Private banks specializing in wealth management should similarly integrate human rights approaches into their asset-management strategies and into the financial products on offer to their clients. For example, as a general policy at the group level, one private bank, Lombard Odier, excludes any investments involving the production or distribution of controversial weapons, including biological and chemical weapons, anti-personnel mines, cluster weapons, depleted uranium and white phosphorus. Lombard Odier has also banned investments in financial instruments such as futures, options, swaps, indices and exchange-traded funds directly related to essential food commodities such as wheat, rice, corn and soybeans,[58] which can be linked to the right to food and food security.

86. The Independent Expert noted that it is essential to rely on external information when assessing the social performance and human rights records of companies. Large corporations in particular tend to publish shiny corporate-responsibility reports that often do not reflect the full picture, in particular regarding social and human rights issues. Initiatives such as the Corporate Human Rights Benchmark, which assesses the human rights performance of 98 of the world's largest publicly traded companies, could partly fill this gap.[59]

VI. Conclusions and recommendations

87. **Switzerland has adopted a human rights policy aimed at coherence and the promotion and protection of human rights at home and abroad.[60] This implies a great challenge, in particular in the financial field. In order to enhance financial and fiscal transparency around the world, national and international actions and effective coordination and cooperation between States are essential.**

88. **In recent years, through a number of efforts, the Federal Council has achieved progress in curbing illicit financial flows that undermine the rule of law and the enjoyment of human rights in Switzerland and in other jurisdictions. The Independent Expert welcomes the fact that the Government of Switzerland expects all businesses operating in Switzerland, including public and private financial institutions, to respect human rights wherever they operate. As a part of this stance, businesses and financial institutions are also required to exercise human rights due diligence throughout their business and client relationships.**

89. **Switzerland can play a key role in curbing illicit financial flows and become a front-runner in integrating human rights into the public and private financial sectors. In the present report, the Independent Expert identifies good practices that other financial centres could follow but also indicates areas where there is room for improvement. For instance, measures could be taken to strengthen the accountability, regulation and supervision of the Swiss financial market to prevent adverse human rights impacts caused by illicit financial flows, investment or insurance policies.**

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[57] Swiss National Bank, *109th Annual Report. Swiss National Bank: 2016* (Bern and Zurich, Swiss National Bank, 2017), p. 75.

[58] Lombard Odier, "Lombardier Odier - SRI Policy", June 2017. Available from www.lombardodier.com/files/live/sites/loportail/files/Documents/AssetManagement/RegulatoryDisclosures/2017/September/Lombard%20Odier%20SRI%20policy%202017_format.pdf.

[59] Corporate Human Rights Benchmark, "2018 methodology: overall scores". Available from www.corporatebenchmark.org/.

[60] Federal Department of Foreign Affairs, Human Rights Strategy 2016–2019.

90. **Human rights considerations should be systematically integrated into the financial policies of public and private institutions based in Switzerland. First, ensuring human rights due diligence is a legal obligation under international human rights standards.[61] Second, further embedding human rights in financial policy would enhance the reputation of the Swiss financial sector, strengthen the credibility of the sector's human rights policies and help to make the Swiss financial market a leader in sustainable finance. Lastly, and most importantly, such a move would improve the protection and enjoyment of human rights in Switzerland and abroad.**

91. **Integrating human rights due diligence into the financial regulatory field should be considered an evolving duty, given that the asymmetric power relations undermining human rights and underlying the operations of financial markets need to be continuously addressed.**

92. **The Independent Expert recommends that the Government and public institutions in Switzerland:**

(a) **Take further steps to prevent the undetected entry of illicit financial flows into the Swiss financial market;**

(b) **Ensure that banks and financial intermediaries exercise sufficient due diligence with clients, in particular politically exposed persons and high-net-worth individuals, and assess the effectiveness of the existing regulatory framework;**

(c) **Introduce sufficiently dissuasive, proportionate and effective sanctions for financial institutions and their employees who fail to exercise due diligence or assist in tax evasion or money-laundering;**

(d) **Reduce significantly the SwF 300,000 threshold for the amount of tax that must be evaded within one year before criminal responsibility is incurred for money-laundering when assisting a foreigner in tax fraud. The offence should also cover all forms of tax evasion and should not be limited to tax fraud;**

(e) **Continue efforts to encourage all financial intermediaries to systematically submit suspicious transaction reports to the Money-Laundering Reporting Office of Switzerland and to expand the Office's power so that, in the absence of a suspicious transaction report in Switzerland, it can obtain information in the possession of financial intermediaries from its foreign counterparts;**

(f) **Expand the number of developing countries participating in the automatic exchange of information on taxation matters by further increasing technical assistance and allowing low-income countries to gradually meet requirements relating to the exchange of taxation information;**

(g) **As envisaged, bring corporate tax regimes into conformity with OECD standards by abolishing tax-reduction schemes that facilitate profit shifting by transnational corporations, without replacing those schemes with new avenues for tax reduction;**

(h) **Continue to support measures at the international level to reduce harmful tax competition between countries;**

(i) **Carry out a human rights impact assessment of the proposed corporate tax reform, in particular its impact on revenues available for the realization of economic and social rights within Switzerland and in developing countries;**

(j) **Increase the staff, resources and powers of the Swiss Financial Market Supervisory Authority in proportion to the size of the Swiss financial market and the volume of assets managed by its financial institutions, to ensure that the Authority has sufficient capacity to supervise all financial intermediaries adequately and irrespective of their size;**

[61] Committee on Economic, Social and Cultural Rights, general comment No. 24; Guiding Principles on Business and Human Rights; and Guiding principles on foreign debt and human rights.

(k) Publicly identify financial institutions that have been subjected to sanctions or corrective action, to ensure individual corporate accountability for non-compliance with banking regulations;

(l) Ensure that stolen assets derived from corruption, misappropriation of public funds and other criminal conduct can be seized by the Swiss authorities when mutual legal assistance is possible, but unsuccessful, because criminal prosecutions fail to take place in foreign jurisdictions or do not meet international due process standards. It should be possible to seize such assets where the holder has failed to demonstrate that they are derived from legitimate economic activities;

(m) Consider revising the Foreign Illicit Assets Act to allow for the freezing and confiscation of assets derived from corruption or other criminal conduct by politically exposed persons while they are still in power;

(n) Regularly monitor the compliance of Swiss financial intermediaries with the prohibition of the financing of the production or development of anti-personnel mines and cluster munitions;

(o) Adopt legislation to prevent the provision of financial services and lending to individuals or State actors responsible for serious or systematic human rights violations;

(p) Ensure that stolen funds are returned to their rightful owners in a timely manner, that the owners of those funds have a say in their final use and that there is full transparency and accountability regarding the funds' use after they are returned;

(q) Ensure that whistle-blower protection in the private sector meets international standards and set consistent criteria governing decisions on whether information provided by whistle-blowers can be validly used as evidence in judicial proceedings;

(r) Ensure, thorough regulation, that financial intermediaries can be held liable for human rights violations that they have caused or contributed to, including the compensation of victims;

(s) Present views on possible measures to improve financial businesses' respect for human rights through regulation in response to proposals that are part of a popular initiative aimed at embedding human rights due diligence in the Swiss legal order;

(t) Develop, in collaboration with financial institutions and banking associations, NGOs and human rights experts, a banking sector agreement on responsible business conduct in Switzerland;

(u) Encourage the Swiss Export Risk Insurance to establish an independent complains mechanism that would allow individuals and communities affected by insured business projects to bring concerns directly to its attention;

(v) Encourage the Swiss National Bank to regularly inform the public about corporations that have been excluded from its investments portfolio due to human rights concerns, and provide more detailed information about its human rights due diligence policy;

(w) Ratify the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights.

93. **The Independent Expert recommends that public and private financial institutions operating in Switzerland:**

(a) Enhance their reporting of suspicious transactions related to corruption, money-laundering or tax evasion to the Money-Laundering Reporting Office of Switzerland;

(b) Ensure that assets managed by them are not invested in businesses or provided to State actors responsible for corruption, tax evasion or violations of human rights or international labour standards;

(c) Adopt policies to prevent the provision of financial services or support to individuals, companies or States responsible for gross violations of human rights;

(d) Implement the Guiding Principles on Business and Human Rights and the Guiding principles on foreign debt and human rights by:

(i) Adopting a human rights policy covering the business operations, client and business relationships and investment policies of public and private financial institutions operating in Switzerland;

(ii) Carrying out appropriate human rights impact assessments before making funding decisions;

(iii) Engaging in meaningful consultations with potentially affected groups and other stakeholders and improving stakeholder consultations and participation by establishing units or appointing officers responsible for engaging with affected individuals, communities and civil society entities;

(iv) Providing remedies for any adverse human rights impact caused or contributed to, and establishing effective operational-level grievance mechanisms that are legitimate, accessible, predictable, equitable, transparent and rights-compatible.

(e) Exercise active shareholder rights and engage in dialogue with non-compliant companies, with the aim of preventing harmful business conduct;

(f) Disinvest from companies that continue to fail to meet human rights standards and report in public about the reasons for such disinvestment.